

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PEDRO ORTEGA also known as PETER
ORTEGA,

Plaintiffs,

-against-

THE CITY OF NEW YORK, THE NEW
YORK CITY POLICE DEPARTMENT,
DETECTIVE JAMES LAMENDOLA,
SHIELD #281, DETECTIVE "JOHN"
MURRAY, DETECTIVE SAL ZISA AND
OTHER UNNAMED POLICE OFFICERS,

Defendant.

**NOTICE OF MOTION
PURSUANT TO 28 USC
§1447 ©) TO REMAND
CASE TO THE SUPREME
COURT, BRONX COUNTY**

Docket No.: 08 CV 6262

SIRS:

PLEASE TAKE NOTICE that upon the attached affirmation of ELLIOT H. FULD, ESQ., attorney for the Plaintiff herein and the exhibits annexed hereto, the undersigned will move this Court (Kaplan, J.) on a date and at time designated by the Court at the Courthouse located at 500 Pearl Street, New York, New York 10007 pursuant to 28 U.S.C. §1447 (c) remanding this case to the Supreme Court, Bronx County, for the reasons set forth infra.

Dated: July 15, 2008

ELLIOT H. FULD, ESQ. (EHF 8389)
Attorney for the Plaintiff
930 Grand Concourse-Suite 1G
Bronx, New York 10451
(718) 410-4111

To: Asst. Corp. Counsel Gabrielle Shakeri
100 Church Street
New York, NY 10007
212-442-0323

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Defendant.

**AFFIRMATION IN
SUPPORT OF
PLAINTIFF'S MOTION
PURSUANT TO 28 USC
§1447 ©) TO REMAND
CASE TO THE SUPREME
COURT, BRONX COUNTY**

Docket No.: 08 CV 6262

ELLIOT H. FULD, an attorney duly licensed to practice law in the Court of the State of New York, hereby affirms the following under the penalties of perjury:

1. I am the attorney for Plaintiff PEDRO ORTEGA also known as PETER ORTEGA and I submit this affirmation in support of Plaintiff's request to have this case remanded to the Supreme Court, Bronx County where it was commenced.
2. My request is both procedural and substantive.
3. Procedurally, any removal of a state court action to federal court pursuant to 28 U.S.C. §§1331, 1441 and 1446 must conform to the rule of unanimity - that is all parties must "...join in seeking removal.." Dunlop v. The City of New York, 2006 U.S. Dist. Lexis 72315 (Case No. 06-CV-433 [KMK]) citing Bradford v. Harding, 284 F.2d 307 (2nd Cir., 1960) and Smith v. Kinkad, 2004 U.S. Dist. Lexis 5647 (03 CV 10283).

4. The initial complaint filed in Supreme Court, Bronx County names five (5) Defendants: a municipal entity (City of New York); an agency of that entity (NYC Police Dept.) and three individual police officers.
5. The City, the Police Department and Detective Lamendola have been served (Exhibit "A") and the City acknowledges service in its affirmation supporting removal (see paragraph "1" of the statement of Gabriele Shakeri dated July 9, 2008.¹
6. However the Notice of Removal filed by the Corporation Counsel's office plainly indicates that it is being filed only on behalf of and at the request of the CITY OF NEW YORK and by and for no other Defendant.
7. Therefore, based upon those grounds alone, the notice of removal filed with this Court must be rejected and the matter remanded to the Supreme Court, Bronx County.
8. With regards to the substance of the removal, I attach as "Exhibit B" a copy of Plaintiff's Amended Verified Complaint which I will be filing with the Bronx Supreme Court and serving upon the Corporation Counsel.
9. I have omitted the Fourth Cause of Action alleging a violation of the Plaintiff's federal

¹. I received the affidavits of service today, by fax and the originals will be filed in Bronx Supreme Court upon receipt from the process server.

constitutional rights as defined by 42 U.S.C. §1983.

10. Therefore all that is now alleged is three causes of action under New York State law with no causes alleged that would grant jurisdiction to this Court or any federal court.
11. Therefore it is respectfully requested that this Court grant Plaintiff's motion to close the matter in the Southern District of New York and remand this case back to the Supreme Court, Bronx County under its original Index number: 304300/08.

Dated: Bronx, New York
July 15, 2008

ELLIOT H. FULD